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ABSTRACT

In this report, the author discusses constitutional doctrines to support the contention that government aid to sectarian schools is a violation of the fundamental principle of separation of church and state. Recent Supreme Court cases are cited to prove the unconstitutionality of using tax funds to finance sectarian schools. The report also refutes pro-parochiaid arguments. (JF)

THE CASE AGAINST PAROCHIAID

By Joseph B. Robison

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ERRATA

On page 12, in the last paragraph, the word "sectarianism" should be "secularization."

On page 13, the next paragraph, the second sentence should read, "...they say that public schools teach a secular approach...."

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." First Amendment, United States Constitution.

Church-State Separation

The drive for government financing of church-related schools would overthrow a precept of our society that has been taken for granted until recently—that the government should not, and may not, give its tax-raised funds to sectarian instruction. This principle is embedded in the First Amendment to the United States Constitution and in parallel provisions in the constitutions of the various states. The American Civil Liberties Union believes that this principle should be preserved intact.

The various forms of aid that have been proposed are frequently lumped together under the title, "parochiaid"—by both proponents and opponents. In practice, all the proposals would aid all nonpublic schools meeting state standards, both sectarian and nonsectarian. (However, schools operated for profit are often excluded.) ACLU has no policy objections to govern-

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ment aid to nonsectarian, nonpublic schools on grounds of establishment of religion. Such schools, however, represent less than 10 per cent of the total attendance at nonpublic schools.

ACLU regards government aid to sectarian schools as a violation of the fundamental principle of separation of church and state. It views the current drive for parochiaid as an attack on the Bill of Rights.

Tax Funds

Of course, there have always been disputes about just what the separation principle means. Like all of our constitutional guarantees, it is surrounded by a gray area. But one concept has been generally taken for granted—the government cannot give *money* to churches or church institutions, directly or indirectly. Government financing of the practice or propagation of religion is not permitted. This principle obviously applies to government financing of sectarian schools, which are set up to propagate religion and which weave sectarian precepts into all aspects of their operations.

Until recently, the principle has not been seriously challenged. Minor forms of support, such as busing and textbooks, have been obtained, sometimes with court approval on various grounds. But not money. The demand that tax monies be used to finance sectarian schools is something new.

Those who supported this demand when it first began to be pressed with vigor five to 10 years ago recognized that the constitutional requirement of separation of church and state, as generally interpreted, stood in the way of simply transferring tax-raised funds into the treasuries of sectarian schools. Consequently, various stratagems were devised for relieving those

schools of the expense of the purely secular aspects of their operations. It was argued that the teaching of arithmetic, science and languages had no sectarian impact and could therefore be paid for out of state funds. (This required either actual or pretended abandonment of a fundamental precept of most if not all sectarian schools —that religion must be interwoven into all subjects.)

The first such stratagem to become law was embodied in a statute enacted in 1968 in Pennsylvania. It authorized the State Superintendent of Public Instruction to "purchase" certain "secular educational services" from non-public schools, directly reimbursing those schools for teachers' salaries, textbooks and instructional materials. In 1969, Rhode Island adopted a statute using a slightly different approach. It authorized state officials to "supplement" the salaries of teachers of secular subjects in nonpublic elementary schools by paying directly to the teachers up to 15 per cent of their current salaries. Similar "purchase of secular services" or "salary supplement" laws were adopted in a few other states.

In June, 1971, the United States Supreme Court ruled that the Pennsylvania and Rhode Island statutes were unconstitutional. Only one Justice dissented. In an opinion delivered by Chief Justice Burger, the Court rejected the ingenuous argument that the statutes aided the pupils rather than the church institutions. It also made it clear that nothing in its opinion should be construed "to disparage the role of church-related elementary and secondary schools in our national life. Their contribution has been and is enormous." The Court reached its decisions, it said, because "the Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of pri-

vate choice, and that while some involvement and entanglement is inevitable, lines must be drawn."

'Entanglement'

Ironically, the Court rested its decision in part on the very provisions that had been designed to save the laws. It held that the elaborate arrangements to insure that the state monies were used only for secular teaching created the kind of "entanglement" of church and state which the separation principle was designed to prevent. The Court said in effect that, in guarding against use of tax-raised funds for religious purposes, the statutes inevitably embroiled the state in improper supervision of church affairs.

However, that was not the whole opinion. The Court also condemned the acts on other grounds, including the fact that any form of financing would create "political divisiveness related to religious belief" because of the "need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow."

Not surprisingly, the advocates of parochiaid did not simply give up after this ruling. But the road they took was rather strange. Concentrating attention on the "entanglement" aspects of the Supreme Court's decision, they threw their weight behind various proposals giving money to parochial schools, directly or indirectly, with no strings attached. This, they said, would avoid the vice of "entanglement."

Of course, no one is proposing direct payments to church schools. The various plans under consideration all involve "indirect" aid, usually under such names as "tuition grants," "tuition reimbursement" and "vouchers." The money is given to the

parents of church school pupils and they turn it over to the school.

Perhaps it is true that these measures avoid or reduce entanglement. However, they provide the very kind of simple financing of the operations of religiously affiliated schools which has always been regarded as impermissible. Hence, it is not surprising that every court that has considered them has held them invalid.

Tax Credits

The latest entrant into this field, "tax credits," makes the aid a little more indirect, but without changing any of its essential features. Under this arrangement, parents of children in nonpublic schools are allowed to deduct a specified amount from the income tax they would otherwise have to pay. It may be $5 per child, or $100, or the full amount of the tuition they have paid.

It would be exalting form over substance if we were to accept the idea that this scheme for financing church-affiliated schools differs either practically or constitutionally from others mentioned above. It is simply another way of financing church schools at the expense of the taxpayer. Whether you give tax credits or tuition reimbursements, the account books of all the parties come out the same. There is just as much less in the public till and just as much more in the church coffers under one plan as the other.

Civil Liberties

ACLU's opposition to these measures does not rest solely, or even primarily, on what the courts have said or may say, about the meaning of the First Amendment. The main basis for our position is

that the very practical considerations that underlie the separation principle reveal the dangers of all forms of state financing of religion. The same factors that prompted the Framers to add to the Constitution the broad language of the clauses on religion in the First Amendment in the Eighteenth Century warrant continued defense of complete separation today. Indeed, the ACLU would today oppose public financing of sectarian schools even if there were no First Amendment—because we believe it violates civil liberties principles.

The reasons may be reviewed briefly. First, there is the involvement of the democratic processes of our government in conflict among religious groups, the "political fragmentation and divisiveness on religious lines" which the Supreme Court warned against in its recent decision. Government support of church schools, the Court there noted, benefits "relatively few religious groups"—those which operate schools. Parochiaid programs, therefore, favor some sects over others, a situation that invites sectarian strife.

Our democratic system, of course, allows room for differences among religions on substantive matters; abortion is a recent example. It is quite a different matter, however, when the conflict is about money—about government support that may affect the survival of a church or its institutions. Resolution of the abortion issue, one way or another, will not affect the ability of any sect to propagate its faith. Resolution of the issue of state aid to church institutions obviously will. Hence, once it is established that the state may finance religious institutions, every sect will be given the strongest possible incentive to mobilize its strength and assets to control governmental agencies and processes.

Already, the issue of parochiaid has

taken too large a place in our elections. If the principle that such aid may be given is ever established, the amount, extent and form will be an issue in every future election—local, state and federal.

Second, separation of church and state is good not only for the state but also for the church. Any time government gives money to private institutions, it must accept responsibility for the way the money is used. This means close supervision of the beneficiary's operations. Church schools must pay a price in loss of independence for every dollar of tax raised funds they get.

The governmental restraints may have many aspects, extending far beyond the existing laws that require maintenance of minimum quality and specific content in curriculum. They would obviously include bars on discrimination based on race and national origin in both hiring and admissions. If the bars extended also to sex and age bias, the characters of many institutions, including aspects that give them their special appeal, might well be affected. But it would also be necessary to bar discrimination on the basis of religion. That requirement would radically alter the character of sectarian schools.

Even this is not the whole story. Basic constitutional principles for which ACLU has fought many successful battles require that such liberties as due process, academic freedom and student rights, which bind public institutions, follow any expenditure of public funds. This is part of the responsibility owed to the public by institutions using public funds.

Finally, in the case of church schools, the restraints accompanying public funds would also include measures to insure that those funds were not used for religious instruction or practices. This would mean eliminating religious content from most if not all secular courses. This has caused

many religious leaders to express concern about the cutting of religious content by church schools seeking to qualify for government aid.

Controls

Two fundamental civil liberties principles are involved here. The first says that those who pay taxes are entitled to know and have a voice in how their money is spent. In the case of public schools, the taxpayer retains a voice, through the ballot box and otherwise. No such control exists as to nonpublic schools unless elaborate procedures for accountability are created. Merely turning public funds over to school officials who are not accountable to the public is taxation without representation.

It is equally important to remember that one of the purposes of the Religion Clauses of the First Amendment is to insure, as the Supreme Court has said repeatedly, that "No tax in any amount... can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Hence, parochiaid programs must contain control procedures to insure that the public funds are not used for sectarian purposes.

Despite these considerations, supporters of parochiaid insist that, if they are not worried about loss of independence, no one else should be. But what is this confidence based on?

On the one hand, the assumption may simply be that the restraints described above will not be imposed. As we have shown, however, that would violate both the principle that those who spend tax-raised funds must be responsible to the taxpayers, and the rule that tax-raised funds may not be used for religious purposes.

On the other hand, it may be assumed that the restraints will be put down on paper but they will not in fact be enforced. This very real possibility is even more dangerous. It invites disrespect for law, either because it is ignored or because it is enforced selectively only against weaker or less popular institutions.

Finally, aid to nonpublic schools would deal a crushing blow to the effort to achieve effective racial integration of the public schools—an effort already facing increasing obstacles and active opposition. Private schools are by their nature selective; they have little reason for existence if they are not. Even if they are subject to and honestly accept a ban on racial discrimination, the selection process tends to favor whites over blacks, particularly in schools limited to or favoring particular religious groups. Fragmentation of the school population among hundreds of private schools would compel abandonment of the effort to undo the effects of past school segregation.

These and other arguments support the view, generally accepted until recently, that government aid to parochial schools is unsound and violative of the constitutional principle of separation of church and state. The proponents of parochiaid nevertheless urge that other considerations require reversal of our past national policy. Let us review these considerations.

'Double Tax'

Perhaps the most familiar argument is that parents who send their children to nonpublic schools are subjected to "double taxation." They are taxed, it is claimed, to support the public schools and then they are taxed again when they pay private school tuition. This, of course, misconceives the function of taxation.

Taxpayers—all of us—are taxed to support activities of a public nature, whether they benefit us directly or not. One of these is maintaining public schools that are open to all. We are taxed for this public purpose, whether or not we have children. We are taxed whether or not we choose to, or even can, use the schools. Even corporations pay school taxes.

Is a company that hires private guards doubly taxed because its taxes also support the local police? Is a wealthy family doubly taxed because it belongs to a private swim club and does not use the public pool? Is the ghetto dweller doubly taxed because he does not use interstate highways? Are Christian Scientists doubly taxed because they help pay for public hospitals which they cannot use? Or wealthy families who prefer private hospitals?

"Double taxation" is a myth. Tuition payments are not taxes. They are the cost of choosing not to use public services. This cost does not differ in any way from the expense of using private hospitals, swimming pools or police forces.

Religious Freedom

Parochiaid proponents sometimes argue that their case *is* different—because the religious freedom clause of the First Amendment guarantees the right of parents to send their children to church schools. That right is worthless, it is claimed, if the parent has to pay in order to exercise it. But the fact that the Constitution tells the government to let you go to a religious school does not mean that the government must pick up the check.

The First Amendment also guarantees freedom of the press, including the right to publish a newspaper. That right, too, is

hard to use effectively if you do not have money. Yet, no one says that the government is required to grant you a voucher or a tax credit to keep your newspaper alive. The First Amendment also guarantees freedom of worship—but you still have to raise your own funds to pay the preacher.

In effect, this argument says that the First Amendment not only permits but requires use of tax-raised funds to finance church institutions. That is a strange interpretation of language written by a man, James Madison, who opposed compelling any citizen "to contribute three pence only of his property" to any church establishment. It is not surprising that every court that has been asked to uphold this view has rejected it.

Freedom of Choice

Then there is the "options" argument. This holds that it is unhealthy to have only one school system, that parents should have several options as to where to send their children, and that the only way to assure this is for the government to provide the financing for several school systems. If there were any validity to this suggestion, it could be implemented without including church schools in violation of the Constitution. In fact, in some school systems today, experimental programs are under way that will give parents the opportunity to choose among public schools having a variety of programs.

Implicit in the "options" argument is the suggestion that the public schools have failed. In fact, there are many parts of the country, particularly in rural and suburban areas, where the public schools are still

doing very well — at least as well as the nonpublic schools. When people talk about the crisis in the public schools today, they almost always refer to the central city areas where the underprivileged, especially the minority group children, are located. Or else they are talking about schools that have been or may be involved in desegregation and other efforts to do something about the inner city schools.

The public schools are indeed short-changing minority group children. But they always have. The present "crisis" arises from society's increasing, though reluctant, awareness that it can no longer continue this neglect.

However, the solution to this crisis lies in doing what we have never really done up to now—providing public school education that really serves the needs of underprivileged children. Those children would not benefit from any program of financing nonpublic schools. It is surely illusory to picture government financing as bringing into existence a significant number of private schools competing for the opportunity to teach educationally retarded pupils. It is far more likely that those pupils would be left behind in a public school system confined to poor children.

Neutrality

A variant on the "options" argument is the contention that the public schools are not religiously neutral, that they affirmatively teach sectarianism, and that the government, to be truly neutral, should also finance those schools that teach religion. However, it is not true that the public schools "teach sectarianism." The faith of the child who has received religious train-

ing at home and in church is not undermined by anything that is taught in his public school. The public schools do not teach anything that conflicts with religious faith. On the contrary, they should, and for the most part do, make clear the role of religion in shaping beliefs and codes of conduct.

Supporters of parochiaid reveal a crude inconsistency in making this argument. On the one hand, they say that public schools teach a sectarian approach to life while their schools teach a religious approach by interweaving religious precepts into all subject matter. On the other hand, they assert that the government may constitutionally support the secular aspects of their operations because, as they say, "there is no such thing as a Catholic arithmetic or a Jewish physics." If, in fact, the teaching of these subjects in parochial schools has been secularized to the extent that they claim (for constitutional purposes), their argument that the public schools teach secularism falls to the ground.

The fundamental weakness of this argument is that it betrays a lack of faith in the ability of the home and the church to teach religion. Those who believe that the government should be supporting parochial schools and other religious institutions are in effect saying that propagation of the faith must fail unless it has government support.

This belief is belied by the American experience. We have operated on the theory that the child can receive his general education in a secular public school and his religious instruction in his home and church. The high proportion of Americans affiliated with a church today—higher than at any time in our history and higher than in most if not all other countries—is ample validation of that theory.

'Dumping'

But it is the "dumping" argument that is supposed to be the real crusher. This one says that the nonpublic schools are in dire straits with one closing every day, that they will all close if they are not bailed out by the government and that the cost of taking care of all those children in the public schools will be far higher than what is being asked for the various parochiaid plans. A book could be written about the fallacies of this argument. Space requires that we cover only the highlights.

First, any plan that proposes to save money by spending it is suspect from the start. Parochiaid in any form costs the state more money here and now. Its claimed future savings are highly speculative.

Second, the demands of the nonpublic school administrators may be modest now but their ultimate, frankly stated, goal is "parity." They assert that they are performing a public function in providing secular education and that the state should cover the entire cost. Obviously, it will not save the taxpayers money to pay for this education in hundreds of private school systems rather than in the public schools.

Third, recent closings of parochial schools are not a simple matter of finances. Studies by Catholic educators and others have shown that population and other trends, including profound philosophical changes in the Catholic community, point inexorably to a continued drop in nonpublic school attendance regardless of financing. Many of the closings of parochial schools that have been publicized in the last few years turn out to involve schools in inner-city areas from which the Catholic population has moved, or schools that have been consolidated as part of an efficiency move paralleled in many public school districts.

Fourth, it is absurd to suggest that a complete shutdown or anything like it is impending. Religious movements which regard their schools as a vital part of their mission do not simply drop them overnight. Financial stress may cause a reduction in the number of children the nonpublic schools can handle but it will certainly not close all of them down.

Fifth, the same population trend that points to declining parochial school enrollment is also producing increased space in the public schools. While "dumping" might cause some dislocations, much of it could be handled with little difficulty in existing public school space. Moreover, the emptied parochial school buildings that are direly predicted would be available for use by the public schools, thus reducing construction costs. If not so used, they would at least be returned to the tax rolls from their present tax-exempt status, thus giving further relief to the taxpayer.

Sixth and last, what this argument really says is that honoring the principle of separation may cost money. That has never been an acceptable reason for violating the Constitution. Surely, our economy is strong enough to bear the burden of fulfilling our obligation to make free public school education available to all our children.

Officials' Responsibility

Here, indeed, is the nub of the whole controversy. Are we going to pay what is necessary to make our public schools work, for the underprivileged as well as for the middle class child, or are we going to turn our backs on those schools and opt instead for government support of privately controlled education? No one should be under the illusion that nonpublic schools can cor-

rect the grossest injustice of our present school set-up—continued segregation and inadequate education for the children of deprived families, predominantly black and Hispano-American. Is it not time for our public officials, legislative and executive, to stop seeking political advantage out of the issue of parochiaid and to start carrying out their prime responsibility of making the public schools work for all?

Recent statements by public officials and by candidates for public office that a way will be found, somehow or other, to finance sectarian schools should be seen as what they are—attacks on the Bill of Rights as a whole. Those who make such statements are saying, in effect, that the guarantees of the Bill of Rights can and should be circumvented or ignored whenever public clamour reaches a level that makes office holders and office seekers uncomfortable. None of our constitutional rights could survive that kind of politics.

Parochiaid is unconstitutional. It should therefore be opposed by government officials, at every level, all of whom have taken an oath to support the Constitution.

Those government officials who have the courage to take that position will find that they have the support of the American people. The people oppose parochiaid. This may be seen in the fact that the almost unanimous decision of the United States Supreme Court against parochiaid in 1971 was widely hailed and aroused little opposition or criticism, except from the groups that were directly affected. It may be seen in the fact that every time parochiaid has been put to the voters on the ballot it has lost — in New York, Michigan and Nebraska.

The struggle to preserve religious freedom in America through preserving strict separation of church and state can be won. It is worth winning.

October, 1972